Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; **THE STATE OF ARIZONA**,

Petitioners,

vs.

ELIZABETH SALGADO; PIMA COUNTY ARIZONA, a body politic,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE ARIZONA SUPREME COURT

PETITION FOR WRIT OF CERTIORARI

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67 pp

QUESTIONS PRESENTED FOR REVIEW

1. Whether Arizona's decision to provide liver transplants to children under the Early and Periodic Screening Diagnosis and Treatment program, as enacted by Congress, and not to adults violates 42 U.S.C. § 1396b(i)(1)(A), which provides that "similarly situated" individuals must be treated alike?

2. Whether Arizona's decision to provide liver transplants to children under the Early and Periodic Screening Diagnosis and Treatment program, as enacted by Congress, and not to adults is an unreasonable denial of services to an otherwise eligible Medicaid recipient?

PARTIES TO THE PROCEEDING

The parties before the Arizona Supreme Court were the plaintiffs, Elizabeth Salgado and Pima County, Arizona, and the defendants, Leonard Kirschner, in his capacity as Director of Arizona Health Care Cost Containment System ("AHCCCS"), and the State of Arizona. University Famli-Care was also a defendant throughout because it is the health care plan with which the State contracted to provide Ms. Salgado covered services. University Famli-Care is not a party to this Petition for Writ of Certiorari.

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REPORTS OF OPINIONS

In the Matter of Elizabeth Salgado, Grievance No. M092189-1 (1990)*

Salgado, et al. v. Kirschner, et al., Pinal County Super. Ct., CIV 39097 (1991)*

Salgado v. Kirschner, 836 P.2d 995 (Ariz. Ct. App. 1992), *rev'd* 878 P.2d 659 (Ariz. 1994)

Salgado v. Kirschner, 878 P.2d 659 (Ariz. 1994)

*Not published.

GROUNDS ON WHICH JURISDICTION IS INVOKED

1. The decision of the Arizona Supreme Court sought to be reviewed herein was entered on July 28, 1994.

2. Petitioners' Motion for Reconsideration was denied on September 20, 1994 and a mandate issued by the Arizona Supreme Court on October 12, 1994.

3. Jurisdiction to review the judgment by writ of certiorari is based on 28 U.S.C. § 1257(a).

STATUTES AND REGULATIONS INVOLVED*

Federal Statutes

42 U.S.C. § 1396a(a)(10)(A)

42 U.S.C. § 1396b(i)

42 U.S.C. § 1396d(a)

42 U.S.C. § 1396d(a)(4)(B)

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42 C.F.R. § 440.40

42 C.F.R. § 441.57

State Statutes

A.R.S. § 36-2907(A)(12)

*Reprinted in the Appendix, pp. A24-41

No.

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LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; **THE STATE OF ARIZONA**,

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Respondents.

PETITION FOR WRIT OF CERTIORARI
TO THE ARIZONA SUPREME COURT

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STATEMENT OF THE CASE

In August of 1989, Elizabeth Salgado ("Ms. Salgado") was 44 years old and categorically eligible for the Arizona Health Care Cost Containment System ("AHCCCS"), Arizona's Title XIX program providing indigent health care. She was suffering from a fatal liver disease known as

primary biliary cirrhosis. Ms. Salgado requested that University Famli-Care, the health care plan responsible for providing Medicaid services to Ms. Salgado under the AHCCCS program, approve and pay for a liver transplant for her.[1] University Famli-Care denied the request because under Arizona law, A.R.S. § 36-2907(A)(12), a liver transplant was not a covered service for an AHCCCS member 18 years of age or older.

Ms. Salgado filed a grievance with AHCCCS, thereby invoking her administrative remedies. AHCCCS denied Ms. Salgado's grievance because state law prohibited coverage of the requested liver transplant. Ms. Salgado requested a hearing as to AHCCCS' decision, which was held on December 7, 1989 before an AHCCCS hearing officer. The hearing officer recommended a denial of the grievance and, ultimately, Dr. Leonard J. Kirschner, the Director of AHCCCS, denied the grievance and her subsequent petition for rehearing by means of his Final Decision, which was based on A.R.S. § 36-2907(A)(12). (Appendix, pp. A19-20).

The Pima County Board of Supervisors thereupon voluntarily agreed to pay for Ms. Salgado's liver transplant. Soon after, Ms. Salgado and Pima County jointly filed an action for judicial review in the Arizona state court against AHCCCS, the State of Arizona and University Famli-Care, seeking review of the administrative decision and declaratory judgment relief. The Complaint alleged that

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[1] The liver transplant was "medically necessary"; neither AHCCCS nor University Famli-Care ever claimed either that the liver transplant was not "medically necessary" or that liver transplantation was "experimental" in her case.

the statute relied on by AHCCCS and University Famli-Care violated "federal laws or regulations."

The Pinal County Superior Court granted AHCCCS' motion to dismiss the Complaint, finding that the Complaint failed to state a claim on which relief could be granted, and thereby affirmed the administrative decision of AHCCCS. (Appendix, pp. A17-18).

An appeal was taken to the Arizona Court of Appeals, in which Ms. Salgado and Pima County argued, *inter alia*, that Arizona's decision to provide liver transplants to children and not adults resulted in unequal treatment for "similarly situated" individuals and, therefore, violated 42 U.S.C. § 1396b(i). The Arizona Court of Appeals affirmed the judgment of the Pinal County Superior Court finding, *inter alia*, that the EPSDT statutes and regulations reflect Congress' intent to permit states to treat adults and children differently. (Appendix, pp. A13-16).

A petition for review by the Arizona Supreme Court was filed by Ms. Salgado and Pima County. The petition for review sought review of various issues, including whether Arizona's statute violates the Equal Protection provisions of the Federal Constitution and whether Arizona's statute affords equal treatment for "similarly situated" individuals under 42 U.S.C. § 1396b(i).

Initially, the Arizona Supreme Court granted review only as to the issue of whether Arizona's statute denies equal protection under the Federal Constitution. After briefing and argument on the equal protection question, the Arizona Supreme Court granted further review on the

additional question of whether the Arizona statute results in a violation of federal Medicaid law and the requirement that "similarly situated" individuals be treated alike under 42 U.S.C. § 1396b(i). After briefing on the supplemental question, but without additional oral argument, the Arizona Supreme Court issued its opinion dated July 28, 1994, reversing the Arizona Court of Appeals, vacating the decision of the Pinal County Superior Court and ordering that judgment be entered in favor of Ms. Salgado and Pima County for the relief requested in the Complaint. (Appendix, pp. A1-12). The Arizona Supreme Court concluded that: (a) 42 U.S.C. § 1396b(i) requires that adults and children be treated equally in the area of transplant coverage and (b) the distinction between children and adults in Arizona is an "unreasonable" denial of services to an otherwise eligible Medicaid recipient.

A timely motion for reconsideration was filed with the Arizona Supreme Court on August 12, 1994. The Arizona Supreme Court denied reconsideration by its order dated September 20, 1994 (Appendix, p. A21) and issued its mandate on October 12, 1994. Judgment was entered on October 21, 1994 by the Pinal County Superior Court in accordance with the Arizona Supreme Court's decision and mandate. (Appendix, pp. A22-23).

ARGUMENT

We ask this Court to grant this Petition, first, because the Arizona Supreme Court has decided an important question of federal law, namely, that Arizona cannot provide liver transplants (and, effectively, any organ transplants) to children under the EPSDT (Early and Periodic Screening and Diagnosis and Treatment) program unless adults are afforded the same coverage, a holding that is squarely inconsistent with the federal Title XIX statutes and regulations governing the EPSDT program. Second, the Arizona Supreme Court's decision is inconsistent with decisions and statements from federal courts in the Fourth, Seventh, and Eleventh Circuits. The Arizona decision is also inconsistent with the interpretation of the federal Medicaid statutes given by the Ninth Circuit Court of Appeals.

ARIZONA'S DECISION TO LIMIT COVERAGE OF LIVER TRANSPLANTS TO CHILDREN UNDER THE EPSDT PROGRAM IS PERMISSIBLE

The EPSDT program was created to give children more comprehensive benefits than adults under Title XIX. The EPSDT program requires states to take steps to diagnose health problems in children and remedy them at an early age.

EPSDT services, defined in 42 U.S.C. § 1396d(r), are one of the seven coverage areas that must be provided under every state Medicaid plan. 42 U.S.C. § 1396a(a)(10)(A). Such services are limited to individuals

under the age of 21.[2] 42 U.S.C. § 1396d(a)(4)(B). The 1988 Arizona statute at issue required AHCCCS to provide medically necessary liver transplants as part of the EPSDT program but not to adults. A.R.S. § 36-2907(A)(12). Nevertheless, the Arizona Supreme Court concluded that organ transplants cannot be provided as part of the EPSDT covered services unless adults are offered the same coverage. The Arizona Supreme Court's conclusion is based, in part, on its interpretation of 42 U.S.C. § 1396d(r)(5) and its determination that Congress' failure to specify organ transplants as an enumerated EPSDT service means organ transplants are not required under the EPSDT program, are therefore optional, and may not be afforded to children under the EPSDT program unless adults are afforded the same coverage.

Congress defined EPSDT serves in 42 U.S.C. § 1396d(r) as screening services, vision services, dental services, hearing services and "[s]uch *other necessary* health care, diagnostic services, *treatment* and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, *whether or not such services are covered under the State plan.*" 42 U.S.C. § 1396d(r) (emphasis added). Petitioners submit that this provision, described by the Arizona Supreme Court as a "catchall," mandates coverage of organ transplants, when medically necessary, as part of the EPSDT services.

The Arizona Supreme Court has, however, incorrectly interpreted § 1396d(r)(5) to encompass only those services specifically enumerated or "described" in § 1396d(a). The Arizona Supreme Court decided that

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[2] At the time Arizona's statute was enacted and at the time Ms. Salgado requested the liver transplant, Arizona limited EPSDT services to individuals under 18.

Congress' failure to specifically include organ transplants in the 25 listed categories of services in § 1396d(a) requires the conclusion that organ transplants are neither mandated nor authorized by § 1396d(r)(5) as part of the EPSDT program.

What this logic fails to address is the fact that the 25 enumerated categories of services in § 1396d(a) cover every conceivable medical procedure available to Medicaid recipients under Title XIX. It would be difficult to imagine a recognized medical procedure that is not within one of the categories of services in § 1396d(a). The procedures necessary to perform an organ transplant operation, namely, physicians' services, inpatient hospital services, laboratory services, diagnostic and screening services and prescription drugs, are all services described in § 1396d(a). The fact that organ transplants as distinct procedures are not specifically listed in § 1396d(a) should not be a surprise because no specific *procedures* are listed in § 1396d(a). The categories of services listed (such as physicians' services, laboratory services, diagnostic and screening services, etc.) are intentionally broader than the endless list of specific procedures that would be necessary if Congress had intended to legislate in such detail. In the absence of any indication to the contrary, the language is clearly inclusive of organ transplants just as it is of any other particular inpatient hospital procedure that is medically necessary. As a result, the Arizona Supreme Court's interpretation of § 1396d(r)(5) is premised upon an unsupported and unsupportable construction of the statute.

Several federal circuit courts and one district court have issued opinions discussing or citing § 1396d(r)(5). In one instance the Eleventh Circuit decided that § 1396d(r)(5) mandates coverage of organ transplants under the EPSDT program. *See Pittman v. Secretary Fla. Dept. of Health & Rehabilitation Servs.*, 998 F.2d 887 (11th Cir. 1993), *cert denied*, 114 S.Ct. 650, 126 L.Ed.2d 608, 62 U.S.L.W. 3409

(U.S. 1993). In the other instances the states had conceded that § 1396d(r)(5) mandates coverage of organ transplants for children, and therefore the courts did not actually decide this question. *See Pereira v. Kozlowski*, 996 F.2d 723 (4th Cir. 1993); *Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993); *McLaughlin v. Williams*, 801 F. Supp. 633 (S.D. Fla. 1992). The Arizona Supreme Court specifically rejected the reasoning of *Pittman*, discussed *Pereira* but found it unpersuasive, and ignored without discussion *Miller* and *McLaughlin*. *Salgado*, 878 P.2d at 663. Instead, the Arizona Supreme Court posited its untenably restrictive interpretation that organ transplants are not mandated by § 1396d(r)(5) and then relied on § 1396b(i) (which seems to make general coverage of organ transplants a state option) to conclude that organ transplants are optional services and, if covered at all, must be provided to children and adults alike, since all persons needing transplants are "similarly situated." This reasoning ignores the children's program and is unfounded.

In *Pittman*, the Eleventh Circuit Court of Appeals specifically held that with respect to organ transplants "[t]he language of § 1396d(r)(5) expressly requires Medicaid participating states to provide necessary treatment 'to correct and ameliorate defects and physical . . . illnesses and conditions discovered by the screening services, *whether or not such services are covered under the State plan.*'" *Pittman*, 998 F.2d 891-92 (quoting 42 U.S.C. § 1396d(r)(5)) (emphasis in opinion). While questioning whether § 1396b(i) gives states the discretion to refuse to cover transplants generally, the *Pittman* court reconciled § 1396b(i) with § 1396d(r)(5) by noting that any discretion given to states under § 1396b(i) was revoked *with respect to children* by the enactment of § 1396d(r)(5). *Id.* at 892. The logic of the *Pittman* court's conclusion is supported by the unambiguous language of § 1396d(r)(5) and the cases, such as *Dexter v. Kirschner*, 984 F.2d 979 (9th Cir. 1992), that

have construed § 1396b(i) to give states discretion in deciding to fund transplants as an optional service available to all covered persons.

The Fourth Circuit's opinion in *Pereira v. Kozlowski*, 996 F.2d 723, was given little weight by the Arizona Supreme Court because the state of Virginia conceded at oral argument that the EPSDT program mandates coverage of organ transplants for children. *See Pereira*, 996 F.2d at 724-25. The court in *Pereira* nevertheless expressly noted that by enactment of § 1396d(r)(5) "Congress imposed upon the states, as a condition of their participation in the Medicaid program, the obligation to provide to children under the age of twenty-one all necessary services, including transplants." 996 F.2d at 725-26. Though the *Pereira* court could have avoided the issue, it did not: "Congress indisputably required that states fund medically necessary organ transplants for children under the age of twenty-one." 996 F.2d at 727.

In *Miller v. Whitburn*, 10 F.3d 1315 (7th Cir. 1993), and *McLaughlin v. Williams*, 801 F. Supp. 633 (S.D. Fla. 1992), the courts assumed with little discussion that the states, Wisconsin and Florida, respectively, are obligated to pay for transplants for children as part of the EPSDT program. *Miller*, 10 F.3d at 1318; *McLaughlin*, 801 F. Supp. at 637, n.3.[3]

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[3] The *McLaughlin* court made a point the Arizona Supreme Court ignored in stating that the term "necessary health care" in § 1396d(r)(5) is no more specific than the term "necessary medical services" in § 1396, which has never been construed as a mandate to provide all medically necessary services available. *See Salgado*, 878 P.2d at 663. The *McLaughlin* court specifically noted that the provisions under § 1396d(r)(5) are substantive mandates respecting coverage of children, whereas § 1396 identifies the groups of people targeted for Medicaid assistance. *See McLaughlin*, 801 F. Supp. at 637, n.3.

Petitioners are aware of no other cases addressing a state's obligation or ability to fund transplants under the EPSDT program. These cases are consistent. The Arizona Supreme Court, by virtue of its decision, stands alone on this issue. No other court, to Petitioners' knowledge, has decided to "carve out" a specific service as not being covered under the EPSDT program.

1. CHILDREN AND ADULTS ARE NOT "SIMILARLY SITUATED" FOR PURPOSES OF 42 U.S.C. § 1396b(i)

After determining that § 1396d(r)(5) does not mandate or authorize coverage of organ transplants as part of the EPSDT services, the Arizona Supreme Court concluded that the "similarly situated" requirement of § 1396b(i) mandates transplant coverage for adults, if a state decides to provide such coverage for children. In so reasoning, the Arizona Supreme Court relied exclusively on the Ninth Circuit's decision in *Dexter v. Kirschner*, 984 F.2d 979 (9th Cir. 1992).[4] The Arizona Supreme Court's analysis of this case finds little support in *Dexter v. Kirschner*. The plaintiff in *Dexter* was an adult, suffering from chronic myelogenous leukemia. The only effective treatment for her was an allogeneic bone marrow transplant. The *Dexter* court determined that Arizona's decision to cover autologous bone marrow transplants but not allogeneic bone marrow transplants was permissible and that it did not violate the "similarly situated" requirement of § 1396b(i). *Dexter*, 984 F.2d at 986. Neither age nor an age distinction was at issue in *Dexter*. Nevertheless, the Arizona Supreme Court borrowed a statement from the *Dexter* opinion to resolve the question in this case.

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[4] The Arizona Supreme Court cites the original *Dexter* opinion at 972 F.2d 1113 (9th Cir. 1992). The amended opinion is found at 984 F.2d 979 (9th Cir. 1992). The substantive differences in the opinions are immaterial for this case.

The *Dexter* court framed its problem as follows:

> The issue we decide with respect to equal protection is if the phrase "similarly situated" in 42 U.S.C. § 1396b(i) means (1) all patients with the same general disease; or (2) all patients who can be effectively treated by the same organ transplant procedure. We conclude that the latter meaning is correct.

Dexter, 984 F.2d at 986. Based on this holding, it is unlikely the *Dexter* court envisioned its decision would guide subsequent courts where the issue was an age or eligibility distinction, rather than the efficacy of different transplant procedures for the same condition. Ms. Dexter's eligibility to receive a transplant was not in issue. The *Dexter* court held that Ms. Dexter was not "similarly situated" to a person who could benefit from an autologous bone marrow transplant because she could not benefit from that particular procedure. It said, and presumably intended, nothing more. Thus, there is nothing to indicate that the *Dexter* court intended its interpretation of the phrase "similarly situated" to substitute for Congress' clear indication that children be treated differently than adults.

There is no indication in the text of § 1396b(i) what Congress intended by its use of the term "similarly situated". The only apparent indication of Congress' intent is derived from a 1987 House Report which states in part:

> To assure that coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations, section 9507 of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA), P.L. 99-272 requires that a State which covers

> organ transplant procedures set forth under its Medicaid plan written standards respecting the coverage of such procedures. Under these standards, similarly situated individuals must be treated alike.

H.R. Rep. No. 100-391, 100th Cong., 1st Sess. (1987), reprinted in U.S. Code Cong. & Admin. News 1987, 2313-1, 2313-352.

These comments do not suggest that Congress intended the "similarly situated" condition in § 1396b(i) to act as a restriction on age distinctions. Indeed, "similarly situated" is a concept that necessarily begins with eligibility as the first criterion, since Title XIX does not serve the general population or even all the indigent.

The children's EPSDT program is by definition a special component of Title XIX designed and intended to benefit children, not adults. The regulations pertaining to the EPSDT program provide that a state "may provide for any other medical or remedial care specified in part 440 of this subchapter, *even if the agency does not otherwise provide for these services to other recipients* . . . ." 42 C.F.R. § 441.57 (emphasis added). Part 440 is a comprehensive list of the substance of the categories of services described and paralleled in § 1396d(a).

Further, 42 C.F.R. § 440.40(b) defines the services to be provided under the EPSDT program, generally:

> (1) Screening and diagnostic services to determine physical or mental defects in recipients under age 21; and
>
> (2) Health care, treatment and other measures to correct or ameliorate any

> defects and chronic conditions discovered.

There is nothing in this provision that would remotely support the Arizona Supreme Court's conclusion that transplants cannot be provided to children under the EPSDT program. Considering this provision, it is difficult to avoid the conclusion that a state *must* provide transplants to children, as a transplant is, without question, a treatment to correct or ameliorate a defect or chronic condition. It is also difficult to avoid the conclusion that the "similarly situated" requirement of § 1396b(i) is one that applies to a State's discretion to cover transplants as an additional covered service for everyone in the program. As *Pereira*, *supra*, correctly holds, § 1396b(i) does not apply to situations were the State has chosen not to cover transplants generally. In such cases, the State must still comply with the expansive EPSDT coverage for children.

2. PROVIDING TRANSPLANTS FOR CHILDREN AND NOT ADULTS IS NOT AN UNREASONABLE DENIAL OF SERVICES

The Arizona Supreme Court concluded that Arizona's decision to cover organ transplants only for children under the EPSDT program "fails the reasonableness test under *Dexter*." *Salgado v. Kirschner*, 878 P.2d 659, 665 (Ariz. 1994). To the extent that there is such a "test" independent of the Equal Protection Clause, it apparently originated in the Eighth Circuit Court of Appeals in *Meusberger v. Palmer*, 900 F.2d 1280 (8th Cir. 1990), where that court stated that "once a state has adopted a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient." 900 F.2d at 1282; *see also Dexter v. Kirschner*, 984 F.2d at 984 (quoting *Meusberger v. Palmer*, 900 F.2d at 1282). The *Meusberger* court did not

indicate the source of its standard. *See Meusberger*, 900 F.2d at 1282.

Presumably, the *Meusberger* court, and accordingly the *Dexter* court, were referring to 42 C.F.R. § 440.230(c) which indicates that a state "may not arbitrarily deny or reduce the amount, duration or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness or condition." Though organ transplants are not a *required* service in § 440.210 or § 440.220, Arizona's decision is neither arbitrary nor based on diagnosis, type of illness or condition. Arizona's decision is based solely on the fact that the EPSDT program mandates coverage of organ transplants for children.

Assuming, *arguendo*, that such a "test," as characterized by the Arizona Supreme Court, exists, Arizona's decision to provide organ transplants to children and not adults cannot be considered unreasonable or arbitrary. Congress has expressly indicated that states may, and in most instances must, provide services to children whether or not they are otherwise available to adults. 42 U.S.C. § 1396d(r)(5); *see also* 42 C.F.R. § 441.57. While the Arizona Supreme Court may not agree with Congress' decision to afford children greater benefits under the Medicaid statutes than adults, Congress' decision cannot be ignored unless the Arizona or Federal Constitution requires a different result. As a result, the decision to cover organ transplants for children and adults cannot be deemed unreasonable under any analysis.

CONCLUSION

By enacting the EPSDT program, Congress afforded the states little discretion as to what services are covered for indigent children, a sentiment that should neither surprise nor disappoint anyone. The Arizona Supreme Court's decision in this case, however, restricts such coverage. It precludes the State from providing transplants as part of the EPSDT program and holds that Arizona must provide transplants to everyone or no one. In this ruling, the Arizona Supreme Court has strayed far from any evidence of Congressional intent, and the result is not warranted by a fair and plain reading of the pertinent statutes and regulations.

This Court should resolve the conflict that currently exists between Arizona and the other states in the interpretation of Title XIX by providing the guidance necessary to ensure consistent application of federal law. Presently, Arizona must follow the mandate of its highest court, which is that either all of the eligible indigent of the state must be provided transplants or the state must refuse to provide any transplants. This analysis eliminates the choice Arizona made of not covering transplants generally but covering them for children under the EPSDT program. Should budget constraints lead Arizona to eliminate coverage even for children because of this analysis, no one will benefit. And Arizona will stand in stark opposition to the letter and spirit of Congress' attempt to provide greater benefits for children.

Petitioners respectfully urge this Court to grant their Petition.

RESPECTFULLY SUBMITTED this ____ day of December, 1994.

JOHNSTON MAYNARD GRANT and PARKER, P.L.C.

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APPENDIX

ELIZABETH SALGADO; PIMA COUNTY ARIZONA, a body politic,
Plaintiffs/Appellants,

v.

LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; THE STATE OF ARIZONA; and UNIVERSITY FAMLI-CARE,
Defendants/Appellees.

Supreme Court No. CV-92-0087-PR

SUPREME COURT OF ARIZONA

July 28, 1994, Filed

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MARTONE, Justice.

The question before us is whether federal law allows Arizona to deny life-sustaining transplant coverage to an otherwise eligible Medicaid recipient solely because she is over 21 years of age. We hold that it does not.

I. BACKGROUND

Arizona chose to participate in Medicaid, 42 U.S.C. §§ 1396-1396v, a joint state-federal funding program for medical care for the needy. "Although participation in the Medicaid program is entirely optional, once a state elects to participate, it must comply with the requirements of Title XIX." *Harris v. McRae*, 448 U.S. 297, 301, 100 S. Ct. 2671, 2680, 65 L. Ed. 2d 784 (1980). Arizona's program is called the Arizona Health Care Cost Containment System (AHCCCS), A.R.S. §§ 36-2901 to -2975.

Elizabeth Salgado (Salgado), an eligible member of AHCCCS, suffered from primary biliary cirrhosis (PBC), a fatal liver disease affecting mostly middle-aged women. Arising from an altered immunity in the patient, PBC destroys the bile ducts in the liver until it ultimately causes cirrhosis. Because it is idiopathic, there is no connection between PBC and lifestyle abuses like alcohol consumption. Its victims, therefore, have no ability to control its onset and rapid progression. At this time, the only effective medical treatment is liver transplantation.

Salgado was first diagnosed with PBC in 1986 when she was 41 years old. In January 1988, her physicians concluded that a liver transplant was her only hope for survival. She applied for coverage through AHCCCS. As she waited for approval, her condition rapidly deteriorated. AHCCCS did not respond to her request until the late summer of 1989. Although University Famli-Care, Salgado's AHCCCS provider, initially approved funding on August 1, 1989, it later denied coverage under A.R.S.

§ 36-2907(A)(12), which limited coverage for liver transplants to persons under 18.[5]

Because her life was at stake, Salgado, her family, and her physician petitioned the Pima County Board of Supervisors for help. In the meantime, she challenged AHCCCS' denial and exhausted her administrative remedies. Happily for her, Pima County granted her request and funded the transplant.[6] Salgado and Pima County then filed an action in the superior court against the director of AHCCCS, the state, and University Famli-Care, seeking review of administrative agency denial, declaratory relief and special action relief. The trial court granted the defendants' motion to dismiss. Salgado and Pima County appealed to the court of appeals, arguing that the statutory age classification violated the federal Medicaid statute and the equal protection clauses of the United States and Arizona Constitutions. The court of appeals affirmed. *Salgado v. Kirschner*, 172 Ariz. 285, 836 P.2d 995 (App. 1992).

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[5]Section 36-2907(A)(12) was amended and renumbered § 36-2907(A)(11) in 1991, and provides:

> A. . . . The following health and medical services shall be provided pursuant to provider contracts under this article:
>
> 11. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician . . . and in addition other medically necessary transplants and immunosuppressant medications for these transplants ordered . . . by a physician . . . and allowed as an early and periodic health screening and diagnosis and treatment service for eligible persons under the age of twenty-one . . . .

[6]Pima County has since funded liver transplants for two other women. Chris Limberis, Supervisors Agree to Pay for Second Liver Transplant, Ariz. Daily Star, Apr. 21, 1993 at 3B. Had AHCCCS covered them, the federal government would have paid for the greater part of the expense.

We first granted review to consider the federal and state equal protection claims. But subsequent developments in Medicaid law in the United States Court of Appeals caused us to later grant review of Salgado's and Pima County's statutory claim as well. The issues are of critical statewide importance. Rule 23(c)(4), Ariz. R. Civ. App. P.

II. ANALYSIS

We first address the statutory question so that we may avoid the resolution of constitutional issues if we can. *Harris*, 448 U.S. at 306-307, 100 S. Ct. at 2683.

The federal Medicaid statute is long on detail, but short on answers to fundamental questions. For example, as the court of appeals properly noted, *Salgado*, 172 Ariz. at 286, 836 P.2d at 996, it remains uncertain to this day whether Medicaid requires the funding of medically necessary treatment. A state plan for medical assistance must, at a minimum, include "at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1396d(a) of this title." 42 U.S.C. § 1396a(a)(10)(A). These are, generally speaking, (1) in-patient hospital services, (2) out-patient hospital services, (3) laboratory and x-ray services, (4) nursing facility services, early and periodic screening, diagnostic, and treatment services (EPSDT) and family planning services, (5) physicians' services, (6) midwife services, and (7) nurse practitioner services. 42 U.S.C. § 1396d(a) (1)-(5), (17) and (21).

If these broad categories of services were tied to medical necessity, then Salgado would be entitled to a liver transplant. But the statute fails to provide any substantive content to the specific care to which a recipient is entitled within each of the broad categories. The Supreme Court discussed this problem in *Beal v. Doe*, 432 U.S. 438, 97 S. Ct. 2366, 53 L. Ed. 2d 464 (1977). It stated that

"although Title XIX does not require States to provide funding for all medical treatment falling within the five [now seven] general categories, it does require that state Medicaid plans establish 'reasonable standards . . . for determining . . . the extent of medical assistance under the plan which . . . are consistent with the objectives of [Title XIX].'" *Id.* at 441, 97 S. Ct. at 2369 (quoting 42 U.S.C. § 1396a(a)(17)). Relying upon 42 U.S.C. § 1396, the Court characterized the objective as enabling each state, as far as practicable, to furnish medical assistance to meet the cost of necessary medical services. *Id.* at 444, 97 S. Ct. at 2371. The Court then seemed to suggest that a serious statutory question might arise if a state Medicaid plan excluded necessary medical treatment from its coverage. Id. But in *Alexander v. Choate*, 469 U.S. 287, 105 S. Ct. 712, 83 L. Ed. 2d 661 (1985), the Court suggested a possible contrary view. It upheld a 14-day limitation on in-patient coverage even if a patient needed to stay longer because "Medicaid programs do not guarantee that each recipient will receive that level of health care precisely tailored to his or her particular needs." *Id.* at 303, 105 S. Ct. at 721. The Court said that the Medicaid Act gives "the states substantial discretion to choose the proper mix of amount, scope, and duration limitations on coverage, as long as care and services are provided in 'the best interests of the recipients.'" Id. (quoting 42 U.S.C. § 1396a(a)(19)).

We need not decide whether the broad service categories include all medically necessary treatment because Arizona has chosen to fund organ transplants. We therefore do not have to decide whether Arizona must fund organ transplants but only whether the line it has drawn is consistent with the federal Medicaid statute.

Salgado and Pima County rely upon 42 U.S.C. § 1396b(i), which provides in relevant part that federal payment to the states shall not be made (1) for organ

transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that –

(A) similarly situated individuals are treated alike;

. . .

Salgado argues that dividing eligible recipients into age categories fails to comply with the "similarly situated" statutory language.

In contrast, AHCCCS argues that the federal Medicaid statute itself allows states to provide greater care to children than to adults. AHCCCS argues that A.R.S. § 36-2907(A)(11) specifically ties liver transplant coverage to federal early and periodic health screening diagnostic and treatment services (EPSDT) defined by 42 U.S.C. § 1396d(r).

Recall that EPSDT services under § 1396d(r) are among the seven mandatory service categories that must be within each state plan under 42 U.S.C. § 1396a(a)(10)(A). An examination of 42 U.S.C. § 1396d(r) reveals that EPSDT services are, for the most part, well-baby-care services, with the following catchall:

> (5) such other necessary health care, diagnostic services, treatment, and other measures described in subsection (a) of this section to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

AHCCCS argues that the state may choose, therefore, to provide transplants to children and not to adults under this catchall.

We first examine the statute and then the federal cases construing them. We think that AHCCCS' argument is foreclosed by the specific language of the catchall. The catchall includes "measures described in subsection (a) of this section . . . whether or not such services are covered under the State plan." But "subsection (a) of this section" refers to § 1396d(a), which includes a list of 24 specific service categories, only seven of which are required to be in each state plan. Thus we read the catchall as simply requiring services for children in the non-mandatory categories under subsection (a). These include, for example, home health care, § 1396d(a)(7), dental services, § 1396d(a)(10), and physical therapy, § 1396d(a)(11). But nowhere is reference made to organ transplants. Recall again that § 1396d(a) describes categories of services, not their substantive content. We do not believe the language of § 1396d(r)(5) ("necessary health care") defines the substantive content of service categories under § 1396d(a) with any greater specificity than does § 1396 ("necessary medical services"), which the Supreme Court has held "does not require States to provide funding for all medical treatment falling within the five [now seven] general categories." *Beal*, 432 U.S. at 441, 97 S. Ct. at 2369. We thus do not read § 1396d(r)(5), the catchall, as either requiring a state to provide organ transplants or authorizing a state to provide organ transplants to children but not to adults.

In contrast, § 1396b(i) specifically addresses organ transplants, and therefore controls this case. There is controversy among the circuits of the United States Court of Appeals over the meaning of § 1396b(i). The United States Court of Appeals for the Eighth and Ninth Circuits

have held that § 1396b(i) is not just a condition on the receipt of federal funds for organ transplants, but is, rather, authorization for the states to decide for themselves whether they want to cover organ transplants even if otherwise medically necessary. *Ellis v. Patterson*, 859 F.2d 52, 55 (8th Cir. 1988). *Dexter v. Kirschner*, 972 F.2d 1113, 1117 (9th Cir. 1992). They conclude that, while a state need not cover any organ transplant, if one chooses to do so, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient. *Ellis*, 859 F.2d at 56; *Dexter*, 972 F.2d at 1118; *Meusberger v. Palmer*, 900 F.2d 1280, 1282 (8th Cir. 1990). In addition, the United States Court of Appeals for the Ninth Circuit has defined "similarly situated" within the meaning of § 1396b(i) as

> All patients who can be treated effectively by the same organ transplant procedure.

Dexter, 972 F.2d at 1120.

In contrast, the United States Court of Appeals for the Fourth and Eleventh Circuits have held that 42 U.S.C. § 1396b(i) does not confer upon the states unqualified discretion as to whether to fund organ transplants. They read § 1396b(i) as a precondition to the payment of the federal share of a transplant, and look to other parts of the Medicaid statute to decide questions of coverage. *Pereira v. Kozlowski*, 996 F.2d 723, 725 (4th Cir. 1993); *Pittman v. Secretary*, 998 F.2d 887, 891 (11th Cir. 1993). In *Pereira*, the state conceded, and the court therefore assumed for purposes of the opinion, that the EPSDT catchall of § 1396d(r)(5) required the state to fund a heart transplant for a child.

In *Pittman*, the Eleventh Circuit joined the Fourth Circuit in concluding that § 1396b(i) is just a payment provision but then went well beyond the Fourth Circuit

and actually held that the catchall language to § 1396d(r)(5) required the states to cover transplants for children even though, as we have seen above, the catchall merely makes the non-mandatory service categories of § 1396d(a) applicable to children. But these are categories of services, which do not define the substantive content of care within each service group. We thus specifically reject Pittman's reading of § 1396d(r)(5).

We need not resolve the conflict over whether § 1396b(i) is a payment provision or gives the states authority to decide if they want to cover transplants, because Arizona has decided that it will cover transplants. It is axiomatic that Arizona would not cover transplants if the federal share would not be paid under § 1396b(i).[7] But the federal share will only be paid if Arizona's plan provides that similarly situated individuals are treated alike, and if the plan is otherwise reasonable.

A. Similarly Situated

We agree with the Ninth Circuit that "similarly situated" means "all patients who can be treated effectively by the same organ transplant procedure." *Dexter*, 972 F.2d at 1120. Salgado is within the class of all patients who can be treated effectively by a liver transplant. Thus, to the extent that A.R.S. § 36-2907(A)(11) excludes persons from coverage solely because they are over 21, it is in violation

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[7]See A.R.S. § 36-2919 (AHCCCS administration and its contractors shall not provide services or be liable for the cost of services provided "if federal monies are unavailable."). See also A.R.S. § 36-2958 (same provision in AHCCCS' Long-Term Care System).

During an organ transplant committee meeting, the Director of AHCCCS stated that the program's goal "is to have as many of the AHCCCS members covered by federal programs as possible, so that the cost is shared." Minutes of the Joint Legislative Study Comm. on Transplants, Jan. 13, 1989, at 4.

of 42 U.S.C. § 1396b(i). And, as we have already indicated, ante, at 2, although a state may choose not to participate in Medicaid, once it does so, it must comply with federal Medicaid statutes.

We believe that, to the extent A.R.S. § 36-2907(A)(11) attempts to limit organ transplants to persons eligible for the EPSDT program under 42 U.S.C. § 1396d(r), it misperceives the nature of § 1396d(r)(5). As we have stated, 42 U.S.C. § 1396d(r)(5) does not define the substantive scope of medically necessary procedures, but by its own terms makes the service categories listed in § 1396d(a) that are optional under § 1396a(a)(10) mandatory for children. While in-patient hospital services and physician services are mandatory under every state plan, § 1396d(r)(5) simply extends the non-optional, and therefore possibly not elected service categories, to children. So, for example, a state may choose not to provide home health care services to adults, because § 1396d(a)(7) is not a mandatory service category under § 1396a(a)(10). But if, as a result of the EPSDT program, a child requires home health care services, he or she would be covered under § 1396d(r)(5). The catchall thus expands service categories for children, but says no more about their substantive content than does the Medicaid statute in general.

B. Reasonableness

AHCCCS argues that excluding persons from coverage solely because they are over 21 is reasonable because the federal Medicaid statute itself makes categories of services mandatory for children that are optional for adults. But the special treatment § 1396d(r) accords to persons under 21 are for services directly related to their status as young persons: basically well-baby and adolescent care. It includes such things as immunizations, periodic

dental checkups, eye glasses, child health maintenance, and early diagnosis.

It is reasonable to expand service categories for age-appropriate care to young persons. But it is unreasonable to allocate treatment within a service category solely on the basis of age. Congress specifically recognized that medically relevant factors, and not solely age, should determine coverage for liver transplants. It acknowledged that there is "no scientific basis for limiting liver transplants to children under 18 years of age," and that "liver transplantation is no longer an experimental procedure for individuals over 18." Budget Reconciliation Act, Pub. L. No. 99-272, § 9217, 100 Stat. 180-81 (1987).

This is not to say that the state may not use age, if it is medically relevant, as one of the factors in drawing distinctions with respect to medical care. With respect to certain treatment, age may well be one of the factors that is medically relevant. But § 36-2907(A)(11) makes age the only factor. As noted in *Dexter*, 972 F.2d at 1118, once a state adopts a policy to cover a category of organ transplants, it may not arbitrarily or unreasonably deny services to an otherwise eligible Medicaid recipient. In terms of life expectancy, no medical evidence has been shown to link youth with a greater response to liver transplant. David H. Van Thiel, Liver Transplantation in Adults, An Analysis of Costs and Benefits at the University of Pittsburgh, 90 Gastroenterology 213 (1986). What has been shown is that other factors, especially the underlying disease, correlate more specifically with survival rates after transplantation. Criteria for Medicare Coverage of Adult Liver Transplants, 55 Fed. Reg. 8545, 8546 (1990).

Thus it is medically irrational to make every person under 21 eligible for a transplant no matter what the chance of survival, and make every person over 21 ineligible, no

matter what other medical factors affect the patient's candidacy for a transplant. To illustrate the arbitrariness of an exclusion based solely on age, a terminally ill 20 year old whose chances for success are small even with a liver transplant would have coverage, but a robust 21 year old whose chances for success are great with a liver transplant would not have coverage. The selection of age, as the sole criterion, without regard to other medical factors, is wholly unrelated to the medical decision at hand. Therefore § 36-2907(A)(11) fails the reasonableness test under *Dexter*.

III. CONCLUSION

Having concluded that the age limitation of A.R.S. § 36-2907(A)(11) fails the reasonableness test and the similarly situated test under the federal Medicaid statute, we need not reach Salgado's and Pima County's claims under the equal protection clause of the United States Constitution and the privileges and immunities clause of the Arizona Constitution.

We vacate the opinion of the court of appeals, reverse the judgment of the superior court and remand for entry of judgment in favor of Salgado and Pima County on their claims for relief.

Frederick J. Martone, Justice

CONCURRING:

Stanley G. Feldman, Chief Justice

James Moeller, Vice Chief Justice

Robert J. Corcoran, Justice

Thomas A. Zlaket, Justice

Elizabeth SALGADO; Pima County Arizona, a body politic,
Plaintiffs/Appellants,

v.

Leonard J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; the State of Arizona; and University Famli-Care,
Defendants/Appellees

No. 2 CA-CV 91-0184

Court of Appeals of Arizona, Division Two, Department A

January 16, 1992

Howard Baldwin, Tucson, for plaintiffs/appellants.

Snell & Wilmer by Dora Fitzpatrick and Laura V. Ridenour, Tucson, for defendant/appellee University Famli-Care.

Johnston Maynard Grant & Parker by Logan T. Johnston and Michael D. Curran, Phoenix, for defendants/appellees Kirschner and State of Arizona.

LIVERMORE, Chief Judge.

Plaintiff Elizabeth Salgado required a liver transplant to survive. She sought funding for that transplant from defendant Arizona Health Care Cost Containment System, Arizona's form of indigent health care which is partially supported by federal Medicaid funds. 42 U.S.C. § 1396, et seq. Her request was denied because, under A.R.S. § 36-2907(A)(12), liver transplants are authorized only for

persons under 18 years of age. In this appeal from an adverse administrative decision, plaintiffs contend that this application of the Arizona statutes violated federal Medicaid statutes and the United States and Arizona constitutions.[8] The trial court disagreed. We affirm.

As we understand plaintiffs' primary argument, it is that the Medicaid statutes require the funding of any medically necessary treatment. Some cases have so held. See, e.g., *Weaver v. Reagen*, 886 F.2d 194 (8th Cir.1989). On the other hand, the United States Supreme Court has recognized "the States' longstanding discretion to choose the proper mix of amount, scope, and duration limitations on services covered by state Medicaid." *Alexander v. Choate*, 469 U.S. 287, 307, 105 S.Ct. 712, 723, 83 L.Ed.2d 661, 676 (1985). While it is possible to square these two lines of authority by saying that the state must provide medically necessary services and may dispense with the unnecessary, that, in fact, would leave little discretion to the states in this era of rapidly advancing, extremely costly medical procedures, all of which can be easily termed necessary by a complaisant medical profession. There is nothing express in the statutes requiring funding of anything medically necessary. Given the Supreme Court's language, we would be reluctant to follow the holding of some federal courts that such a requirement is implicit. We need not reach that issue, however, because in the area of organ transplantation, it has been expressly held that state funding is not required. *Meusberger v. Palmer*, 900 F.2d 1280 (8th Cir.1990); *Ellis v. Patterson*, 859 F.2d 52 (8th Cir.1988). As *Ellis* explained, the legislative history to the amendment to 42 U.S.C. § 1396b(i) covering federal funding of organ transplantations, makes it is clear that Congress did not intend to require states to cover such procedures. The clarity of this legislative intent

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[8]Pima County paid for Ms. Salgado's transplant and has joined her in seeking reimbursement.

effectively destroys plaintiffs' argument that the federal Medicaid statutes mandate state funding of Ms. Salgado's liver transplant.

Alternatively, plaintiffs argue that even if a state may deny transplants entirely, once any transplant of a particular type is funded, as are liver transplants in Arizona for those under 18, all must be. This principle is derived from the provision of 42 U.S.C. § 1396b(i) precluding federal payment for organ transplants unless made pursuant to written state standards providing that "similarly situated individuals are treated alike." Again, the legislative history of this provision, quoted in Ellis, supra, establishes that the intent was "to assure that State coverage decisions for organ transplants are based on clear principles consistently applied, and not on political or media considerations." 859 F.2d at 55. Or, as explained in *Meusberger*, *supra*, the purpose was "to provide objective criteria, subject to challenge as being arbitrary or unreasonable." 900 F.2d at 1283. Age is, of course, a clear principle that can be consistently applied. Nor is youth an unreasonable or arbitrary factor in spending public funds. If the state is free not to fund any transplants, we see nothing unreasonable in spending some money to benefit those who will have the longest remaining life as a result of the procedure.[9] See *Kantrowitz v. Weinberger*, 388 F.Supp. 1127 (D.D.C.1974), aff'd 530 F.2d 1034 (D.C.Cir.1976). There being a rational

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[9]Even if this distinction could not be otherwise justified, 42 C.F.R. § 441.57 permits a state to provide indigent services to minors that it does not provide to others. Specifically, it allows states to provide additional early periodic screening, diagnosis, and treatment services (EPSDT services) under 42 U.S.C. § 1396d(a)(4)(B), "even if the agency does not otherwise provide these services to other recipients or provides them in a lesser amount, duration, or scope." Given this regulation, it is impossible to argue that reserving certain services to minors violates the federal statutory scheme. Indeed, 42 U.S.C. § 1396 is cited in A.R.S. § 36-2907(A)(12) as the basis on which the state authorized liver transplants for those under 18.

basis for the statutory differentiation, plaintiffs' equal protection claims under the state and federal constitutions also fail. *McGowan v. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed.2d 393 (1961); *Bryant v. Continental Conveyor Equipment Co.*, 156 Ariz. 193, 751 P.2d 509 (1988).[10]

In view of our disposition of these issues, we need not reach other issues raised in the appeal. The judgment is affirmed.

CONCURRING:

LaCagnina, P.J.
Howard, J.

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[10]Plaintiff also contends that the age distinction renders A.R.S. § 36-2907(A)(12) invalid as a special law under Ariz.Const. Art. 4 part 2, § 19. To the extent that this is premised on the absence of a rational basis for the legislative action, it fails for the reasons already stated. To the extent that it is based on the argument that age distinctions are per se invalid, it is rejected for absence of authority. See *Republic Investment Fund I v. Town of Surprise*, 166 Ariz. 143, 800 P.2d 1251 (1990).

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

ELIZABETH SALGADO; PIMA COUNTY ARIZONA, a body politic,

Plaintiffs,

v.

LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; THE STATE OF ARIZONA; and UNIVERSITY FAMLI-CARE,

Defendants.

No. CIV 39097

ORDER

The Court having considered the arguments of counsel, the memoranda of law on file herein and being fully advised in the premises finds that plaintiffs have failed to state a cause of action upon which relief can be granted as to Counts One and Two of Plaintiffs' Complaint, therefore, Defendant's Motion to Dismiss should be granted; and, having reviewed the administrative record and having considered Plaintiffs' Demand for Trial De Novo and all pertinent matters of record related thereto, finds that the administrative record is complete and that the decision of the administrative agency should be affirmed; therefore,

IT IS ORDERED granting Defendants' Motion to Dismiss Counts One and Two of Plaintiffs' Complaint, and the same hereby are dismissed;

IT IS FURTHER ORDERED denying Plaintiffs' Demand for a Trial De Novo on Count Three; and

IT IS FURTHER ORDERED affirming the decision of the administrative agency and dismissing Count Three of Plaintiffs' Complaint; and,

Based upon the Court's ruling herein, all other pending motions appear moot.

DONE IN OPEN COURT this 20th day of June, 1991.

s/_____
ROBERT R. BEAN
Judge of the Superior Court

BEFORE THE DIRECTOR OF THE

ARIZONA HEALTH CARE COST CONTAINMENT SYSTEM

In the Matter of:
ELIZABETH SALGADO

Grievant,

vs.

UNIVERSITY FAMLI-CARE

Respondent.

AHCCCS GRIEVANCE HEARING

Grievance No. M092189-1

FINAL DECISION

PURSUANT to the authority granted to me by A.R.S. § 36-2903.01(B)(4) and Article 8 of the Administrative Rules and Regulations, and in consideration of the record in the above matter, I hereby make the following Decision and Order:

On February 13, 1990, the Petitioner submitted a Petition for a Rehearing of the Director's Decision issued on January 26, 1990. The Petitioner has failed to establish any one of the following causes enumerated in Article 8 of the Administrative Rules and Regulations necessary to sustain a Petition for Rehearing: irregularity in the proceedings of the hearing or appeal which deprived her of a fair hearing or appeal; misconduct of a party, county or agency; newly discovered material evidence which could not have been discovered and proved at the hearing; that the Decision is the result of passion or prejudice; or, the Decision is not justified by the evidence or is contrary to law.

The Director's Decision is justified and supported by substantial evidence and is not contrary to law for the following reasons:

Liver transplant operations are a covered service only for persons under eighteen (18) years of age. A.R.S. § 36-2907(A)(12); A.A.C. R9-22-203(A)(20). Petitioner is more than seventeen (17) years of age. The statutory and regulatory provisions which provide for liver transplants for those individuals under eighteen (18) years of age are constitutional and do not violate any federal or state law. *See generally Beale v. Doe*, 432 U.S. 439, 97 S. Ct. 2366 (1977) and *Charleston Memorial Hospital v. Conrad*, 693 F.2d 324 (4th Cir. 1982). Accordingly, the Petition for Rehearing is denied and the Director's Decision is sustained.

IT IS ORDERED that the findings of fact, conclusion of law and Decision dated January 26, 1990, in this matter are supported by substantial evidence and are therefore adopted as part of this Final Decision.

PURSUANT TO the requirements of A.R.S. § 36-2903.01(B)(4), this Decision is a final administrative decision and is subject to judicial review in accordance with A.R.S. § 12-901 *et seq.*

Leonard J. Kirschner, M.D., M.P.H.
Director, AHCCCSA
DATED: February 28, 1990

SUPREME COURT
STATE OF ARIZONA

402 Arizona State Courts Building
1501 West Washington
Phoenix, Arizona 85007-3329

September 22, 1994

RE: **ELIZABETH SALGADO/PIMA COUNTY ARIZONA vs. LEONARD J. KIRSCHNER/STATE OF ARIZONA/ UNIVERSITY FAMLI-CARE**
Supreme Court No. CV-92-0087-PR
Court of Appeals No. 2 CA-CV 91-0184
Pinal County No. 39097

GREETINGS:

The following action was taken by the Supreme Court of the State of Arizona on September 20, 1994, in regard to the above-referenced cause:

ORDERED: Defendants/Appellees' Motion for Reconsideration = DENIED.

NOEL K. DESSAINT, Clerk

IN THE SUPERIOR COURT OF THE STATE OF ARIZONA

IN AND FOR THE COUNTY OF PINAL

ELIZABETH SALGADO; PIMA COUNTY, ARIZONA,
a body politic,
Plaintiffs,

v.

LEONARD J. KIRSCHNER, in his capacity as Director of Arizona Health Care Cost Containment System; THE STATE OF ARIZONA, and UNIVERSITY PHYSICIANS, dba UNIVERSITY FAMLI-CARE,
Defendants.

No. CIV-39097

JUDGMENT

This case having been reviewed by the Arizona Supreme Court (No. CV-92-0087-PR), and that court having rendered its opinion and remanded this matter to this court for entry of judgment in favor of Plaintiffs, the court having determined the amount of reimbursement due to Pima County and there appearing to be no just cause for delay,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

That ELIZABETH SALGADO was, as of the date of her application for a liver transplant, and is eligible for coverage under AHCCCS, for all medical procedures and hospitalization including after care for the liver transplant operation.

That the Defendants were and are responsible for approving and paying for all medical procedures, hospitalization and after care necessary to provide and

maintain a liver transplant for ELIZABETH SALGADO, and PIMA COUNTY has paid for such expenses, therefore, Plaintiff PIMA COUNTY shall have judgment against the Defendants jointly and severally in the amount of $102,889.74 as a reimbursement of such costs.

That in addition to the amount of reimbursement set forth above, PIMA COUNTY, ARIZONA shall have a judgment against Defendants in the amount of $33,451.35 which represents interest at the legal rate from the date the expenses were incurred, through August 31, 1994, judgment for costs in the Superior Court in the amount of $168.75 and costs in the Appellate Courts in the amount of $866.75. The total judgment in the amount of $137,376.59 shall bear interest at the legal rate beginning September 1, 1994 and be subject to continuing costs until paid.

DONE on this 21st day of October, 1994.

s/
ROBERT R. BEAN, JUDGE
OF THE SUPERIOR COURT

42 U.S.C. § 1396a(a)(10)(A)

State Plans for Medical Assistance

(a) Contents

A State plan for medical assistance must—

* * *

(10) provide—

(A) for making medical assistance available, including at least the care and services listed in paragraphs (1) through (5), (17) and (21) of section 1905(a) [42 USCS § 1396d(a)(1)–(5), (17) and (21)], to—

* * *

42 U.S.C. § 1396b(i)(1)

(i) Payment for organ transplants; item or service furnished by excluded individual, entity, or physicians; other restrictions.

Payment under the preceding provisions of this section shall not be made—

(1) for organ transplant procedures unless the State plan provides for written standards respecting the coverage of such procedures and unless such standards provide that—

(A) similarly situated individuals are treated alike; and

(B) any restriction, on the facilities or practitioners which may provide such procedures, is consistent with the accessibility of high quality care to individuals eligible for the procedures under the State plan; or

* * *

42 U.S.C. § 1396d(a)

(a) Medical assistance. The term "medical assistance" means payment of part or all of the cost of the following care and services (if provided in or after the third month before the month in which the recipient makes application for assistance or, in the case of medicare cost-sharing with respect to a qualified medicare beneficiary described in subsection (p)(1), if provided after the month in which the individual becomes such a beneficiary) for individuals, and, with respect to physicians' or dentists' services, at the option of the State, to individuals (other than individuals with respect to whom there is being paid, or who are eligible, or would be eligible if they were not in a medical institution, to have paid with respect to them a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1902(a)(10)(A) [42 USCS § 1396a(a)(10)(A)]) not receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq., or 601 et seq.], and with respect to whom supplemental security income benefits are not being paid under title XVI [42 USCS §§ 1381 et seq.], who are—

(i) under the age of 21, or, at the option of the State, under the age of 20, 19, or 18 as the State may choose,

(ii) relatives specified in section 406(b)(1) [42 USCS § 606(b)(1)] with whom a child is living if such child is (or would, if needy, be) a dependent child under part A of title IV [42 USCS §§ 601 et seq.],

(iii) 65 years of age or older,

(iv) blind, with respect to States eligible to participate in the State plan program established under title XVI [42 USCS §§ 1381 et seq.],

(v) 18 years of age or older and permanently and totally disabled, with respect to States eligible to participate in the

State plan program established under title XVI [42 USCS §§ 1381 et seq.],

(vi) persons essential (as described in the second sentence of this subsection) to individuals receiving aid or assistance under State plans approved under title I, X, XIV, or XVI [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq.],

(vii) blind or disabled as defined in section 1614 [42 USCS § 1382c], with respect to States not eligible to participate in the State plan program established under title XVI [42 USCS §§ 1381 et seq.],

(viii) pregnant women,

(ix) individuals provided extended benefits under section 1925 [42 USCS § 1396r-6],

(x) individuals described in section 1902(u)(1) [42 USCS § 1396a(u)(1)], or

(xi) individuals described in section 1902(z)(1) [42 USCS § 1396a(z)(1)],

but whose income and resources are insufficient to meet all of such cost—

(1) inpatient hospital services (other than services in an institution for mental diseases);

(2) (A) outpatient hospital services, (B) consistent with State law permitting such services, rural health clinic services (as defined in subsection (l)(1)) and any other ambulatory services which are offered by a rural health clinic (as defined in subsection (l)(1)) and which are otherwise included in the plan, and (C) Federally-qualified health center services (as defined in subsection (l)(2)) and any other ambulatory services offered by a Federally-qualified health center and which are otherwise included in the plan;

(3) other laboratory and X-ray services;

(4) (A) nursing facility services (other than services in an institution for mental diseases) for individuals 21 years of age or older; (B) early and periodic screening, diagnostic, and treatment services (as defined in subsection (r)) for

individuals who are eligible under the plan and are under the age of 21; and (C) family planning services and supplies furnished (directly or under arrangements with others) to individuals of childbearing age (including minors who can be considered to be sexually active) who are eligible under the State plan and who desire such services and supplies;

(5) (A) physicians' services furnished by a physician (as defined in section 1861(r)(1) [42 USCS § 1395x(r)(1)]), whether furnished in the office, the patient's home, a hospital, or a nursing facility, or elsewhere, and (B) medical and surgical services furnished by a dentist (described in section 1861(r)(2) [42 USCS § 1395x(r)(2)]) to the extent such services may be performed under State law either by a doctor of medicine or by a doctor of dental surgery or dental medicine and would be described in clause (A) if furnished by a physician (as defined in section 1861(r)(1) [42 USCS § 1395x(r)(1)]);

(6) medical care, or any other type of remedial care recognized under State law, furnished by licensed practitioners within the scope of their practice as defined by State law;

(7) home health care services;

(8) private duty nursing services;

(9) clinic services furnished by or under the direction of a physician, without regard to whether the clinic itself is administered by a physician, including such services furnished outside the clinic by clinic personnel to an eligible individual who does not reside in a permanent dwelling or does not have a fixed home or mailing address;

(10) dental services;

(11) physical therapy and related services;

(12) prescribed drugs, dentures, and prosthetic devices; and eyeglasses prescribed by a physician skilled in diseases of the eye or by an optometrist, whichever the individual may select;

(13) other diagnostic, screening, preventive, and rehabilitative services, including any medical or remedial

services (provided in a facility, a home, or other setting) recommended by a physician or other licensed practitioner of the healing arts within the scope of their practice under State law, for the maximum reduction of physical or mental disability and restoration of an individual to the best possible functional level;

(14) inpatient hospital services and nursing facility services for individuals 65 years of age or over in an institution for mental diseases;

(15) services in an intermediate care facility for the mentally retarded (other than in an institution for mental diseases) for individuals who are determined, in accordance with section 1902(a)(31)(A) [42 USCS § 1396a(a)(31)(A)], to be in need of such care;

(16) effective January 1, 1973, inpatient psychiatric hospital services for individuals under age 21, as defined in subsection (h);

(17) services furnished by a nurse-midwife (as defined in section 1861(gg) [42 USCS § 1395x(gg)]) which the nurse-midwife is legally authorized to perform under State law (or the State regulatory mechanism provided by State law), whether or not the nurse-midwife is under the supervision of, or associated with, a physician or other health care provider, and without regard to whether or not the services are performed in the area of management of the care of mothers and babies throughout the maternity cycle;

(18) hospice care (as defined in subsection (o));

(19) case management services (as defined in section 1915(g)(2) [42 USCS § 1396n(g)(2)]) and TB-related services described in section 1902(z)(2)(F) [42 USCS § 1396a(z)(2)(F)];

(20) respiratory care services (as defined in section 1902(e)(9)(C) [42 USCS § 1396a(e)(9)(C)]);

(21) services furnished by a certified pediatric nurse practitioner or certified family nurse practitioner (as defined by the Secretary) which the certified pediatric nurse practitioner or certified family nurse practitioner is legally

authorized to perform under State law (or the State regulatory mechanism provided by State law), whether or not the certified pediatric nurse practitioner or certified family nurse practitioner is under the supervision of, or associated with, a physician or other health care provider;

(22) home and community care (to the extent allowed and as defined in section 1929 [42 USCS § 1396t]) for functionally disabled elderly individuals;

(23) community supported living arrangements services (to the extent allowed and as defined in section 1930;

(24) personal care services furnished to an individual who is not an inpatient or resident of a hospital, nursing facility, intermediate care facility for the mentally retarded, or institution for mental disease that are (A) authorized for the individual by a physician in accordance with a plan of treatment or (at the option of the State) otherwise authorized for the individual in accordance with a service plan approved by the State, (B) provided by an individual who is qualified to provide such services and who is not a member of the individual's family, and (C) furnished in a home or other location; and

(25) any other medical care, and any other type of remedial care recognized under State law, specified by the Secretary.

except as otherwise provided in paragraph (16), such term does not include—

(A) any such payments with respect to care or services for any individual who is an inmate of a public institution (except as a patient in a medical institution); or

(B) any such payments with respect to care or services for any individual who has not attained 65 years of age and who is a patient in an institution for mental diseases;

For purposes of clause (vi) of the preceding sentence, a person shall be considered essential to another individual if such person is the spouse of and is living with such individual, the needs of such person are taken into account in determining the amount of aid or assistance furnished to

such individual (under a State Plan approved under title I, X, XIV, or XVI [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq.]), and such person is determined, under such a State plan, to be essential to the well-being of such individual. The payment described in the first sentence may include expenditures for medicare cost-sharing and for premiums under part B of title XVIII [42 USCS §§ 1395j et seq.] for individuals who are eligible for medical assistance under the plan and (A) are receiving aid or assistance under any plan of the State approved under title I, X, XIV, or XVI, or part A of title IV [42 USCS §§ 301 et seq., 1201 et seq., 1351 et seq., or 1381 et seq., or 601 et seq.], or with respect to whom supplemental security income benefits are being paid under title XVI [42 USCS §§ 1381 et seq.], or (B) with respect to whom there is being paid a State supplementary payment and are eligible for medical assistance equal in amount, duration, and scope to the medical assistance made available to individuals described in section 1902(a)(10)(A) [42 USCS § 1396a(a)(10)(A)], and, except in the case of individuals 65 years of age or older and disabled individuals entitled to health insurance benefits under title XVIII [42 USCS §§ 1395 et seq.] who are not enrolled under part B of title XVIII [42 USCS §§ 1395j et seq.], other insurance premiums for medical or any other type of remedial care or the cost thereof. No service (including counseling) shall be excluded from the definition of "medical assistance" solely because it is provided as a treatment service for alcoholism or drug dependency.

42 U.S.C. § 1396d(r)

(r) Early and periodic screening, diagnostic, and treatment services.

The term "early and periodic screening, diagnostic, and treatment services" means the following items and services:

(1) Screening services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical and dental practice, as determined by the State after consultation with recognized medical and dental organizations involved in child health care and, with respect to immunizations under subparagraph (B)(iii), in accordance with the schedule referred to in section 1928(c)(2)(B)(i) [42 USCS § 1396s(c)(2)(B)(i)] for pediatric vaccines, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of certain physical or mental illnesses or conditions; and

(B) which shall at a minimum include—

(i) a comprehensive health and developmental history (including assessment of both physical and mental health development),

(ii) a comprehensive unclothed physical exam,

(iii) appropriate immunizations (according to the schedule referred to in section 1928(c)(2)(B)(i) [42 USCS § 1396s(c)(2)(B)(i)] for pediatric vaccines) according to age and health history,

(iv) laboratory tests (including lead blood level assessment appropriate for age and risk factors), and

(v) health education (including anticipatory guidance).

(2) Vision services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in vision, including eyeglasses.

(3) Dental services—

(A) which are provided—

(i) at intervals which meet reasonable standards of dental practice, as determined by the State after consultation with recognized dental organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include relief of pain and infections, restoration of teeth, and maintenance of dental health.

(4) Hearing services—

(A) which are provided—

(i) at intervals which meet reasonable standards of medical practice, as determined by the State after consultation with recognized medical organizations involved in child health care, and

(ii) at such other intervals, indicated as medically necessary, to determine the existence of a suspected illness or condition; and

(B) which shall at a minimum include diagnosis and treatment for defects in hearing, including hearing aids.

(5) Such other necessary health care, diagnostic services, treatment, and other measures described in section 1905(a) [subsec. (a) of this section] to correct or ameliorate defects and physical and mental illnesses and conditions discovered by the screening services, whether or not such services are covered under the State plan.

Nothing in this title [42 USCS §§ 1396 et seq.] shall be construed as limiting providers of early and periodic screening, diagnostic, and treatment services to providers

who are qualified to provide all of the items and services described in the previous sentence or as preventing a provider that is qualified under the plan to furnish one or more (but not all) of such items or services from being qualified to provide such items and services as part of early and periodic screening, diagnostic, and treatment services. The Secretary shall, not later than July 1, 1990, and every 12 months thereafter, develop and set annual participation goals for each State for participation of individuals who are covered under the State plan under this title [42 USCS §§ 1396 et seq.] in early and periodic screening, diagnostic, and treatment services.

42 CFR § 440.40 Skilled nursing facility services for individuals age 21 or older (other than services in an institution for mental diseases). EPSDT, and family planning services and supplies.

(a) Skilled nursing facility services. (1) "Skilled nursing facility services for individuals age 21 or older, other than services in an institution for mental diseases", means services that are—

(i) Needed on a daily basis and required to be provided on an inpatient basis under §§ 409.31 through 409.35 of this chapter.

(ii) Provided by (A) a facility or distinct part of a facility that is certified to meet the requirements for participation under subpart C of part 442 of this subchapter, as evidenced by a valid agreement between the Medicaid agency and the facility for providing skilled nursing facility services and making payments for services under the plan; or (B) if specified in the State plan, a swing-bed hospital that has an approval from HCFA to furnish skilled nursing facility services in the Medicare program; and

(iii) Ordered by and provided under the direction of a physician.

(2) Skilled nursing facility services includes services provided by any facility located on an Indian reservation and certified by the Secretary as meeting the requirements of subpart K of part 405 of this chapter.

(b) EPSDT. "Early and periodic screening and diagnosis and treatment" means—

(1) Screening and diagnostic services to determine physical or mental defects in recipients under age 21; and

(2) Health care, treatment, and other measures to correct or ameliorate any defects and chronic conditions discovered. (See subpart B of part 441 of this subchapter.)

(c) Family planning services and supplies for individuals of child-bearing age. [Reserved]

42 C.F.R. § 441.57 Discretionary services.

Under the EPSDT program, the agency may provide for any other medical or remedial care specified in part 440 of this subchapter, even if the agency does not otherwise provide for these services to other recipients or provides for them in a lesser amount, duration, or scope.

42 C.F.R. § 440.210 Required services for the categorically needy.

(a) A State plan must specify that, as a minimum, categorically needy recipients are provided the following services:

(1) The services as specified in §§ 440.10 through 440.50, 440.70 and (to the extent nurse-midwives are authorized to practice under State law or regulation), § 440.165;

(2) Pregnancy-related services and services for other conditions that might complicate the pregnancy.

(i) Pregnancy-related services are those services that are necessary for the health of the pregnant woman and fetus, or that have become necessary as a result of the woman having been pregnant. These include, but are not limited to, prenatal care, delivery, postpartum care, and family planning services.

(ii) Services for other conditions that might complicate the pregnancy include those for diagnoses, illnesses, or medical conditions which might threaten the carrying of the fetus to full term or the safe delivery of the fetus; and

(3) For women who, while pregnant, applied for, were eligible for, and received Medicaid services under the plan, all services under the plan that are pregnancy-related for an extended postpartum period. The postpartum period begins on the last day of pregnancy and extends through the end of the month in which the 60-day period following termination of pregnancy ends.

(b) A State plan must specify that eligible aliens as defined in §§ 435.406(a) and 436.406(a) of this subchapter will receive at least the services provided in paragraph (a) of this section.

(c) A State plan must specify that aliens not defined in §§ 435.406(a) and 436.406(a) of this subchapter will only be provided the limited services specified in § 440.255.

42 C.F.R. § 440.220 Required services for the medically needy.

(a) A State plan that includes the medically needy must specify that the medically needy are provided, as a minimum, the following services:

(1) Prenatal care and delivery services for pregnant women.

(2) Ambulatory services, as defined in the State plan, for:

(i) Individuals under age 18; and

(ii) Groups of individuals entitled to institutional services.

(3) Home health services (§ 440.70) to any individual entitled to skilled nursing facility services.

(4) If the State plan includes services in an institution for mental diseases (§ 440.140 or § 440.160) or in an intermediate care facility for the mentally retarded (§ 440.150(c)) for any group of medically needy, either of the following sets of services to each of the medically needy groups:

(i) The services contained in §§ 440.10 through 440.50 and (to the extent nurse-midwives are authorized to practice under State law or regulation) § 440.165; or

(ii) The services contained in any seven of the sections in §§ 440.10 through 440.165.

(5) For women who, while pregnant, applied for, were eligible as medically needy for, and received Medicaid services under the plan, services under the plan that are pregnancy-related (as defined in § 440.210(a)(2)(i) of this subpart) for an extended postpartum period. The postpartum period begins on the last day of pregnancy and extends through the end of the month in which the 60-day period following termination of pregnancy ends.

(b) A State plan must specify that eligible aliens as defined in §§ 435.406(a) and 436.406(a) of this subchapter will receive at least the services provided in paragraphs (a)(4) (i) and (ii) of this section.

(c) A State plan must specify that aliens defined in §§ 435.406(b), 435.406(c), 436.406(b) and 436.406(c) of this subchapter will only be provided the limited services specified in § 440.255.

42 C.F.R. § 440.230 Sufficiency of amount, duration, and scope.

(a) The plan must specify the amount, duration, and scope of each service that it provides for—

(1) The categorically needy; and
(2) Each covered group of medically needy.

(b) Each service must be sufficient in amount, duration, and scope to reasonably achieve its purpose.

(c) The Medicaid agency may not arbitrarily deny or reduce the amount, duration, or scope of a required service under §§ 440.210 and 440.220 to an otherwise eligible recipient solely because of the diagnosis, type of illness, or condition.

(d) The agency may place appropriate limits on a service based on such criteria as medical necessity or on utilization control procedures.

§ 36-2907. Covered health and medical services; definitions; modifications; related delivery of service requirements

A. Unless modified pursuant to subsection G or H of this section, the following health and medical services shall be provided pursuant to provider contracts awarded under this article:

* * *

12. Medically necessary kidney, cornea and bone transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 82, chapter 18 or 17 and, beginning October 1, 1988, medically necessary liver transplants and immunosuppressant medications for these transplants ordered on prescription by a physician licensed pursuant to title 32, chapter 13 or 17 allowed as an early and periodic health screening and diagnosis and treatment service for children under the age of eighteen years and defined as eligible pursuant to § 36-2901, paragraph 4, subdivision (b) if federal financial participation is available under title XIX of the Social Security act for this service above the prepaid capitation amount for that person. No other organ transplants may be covered by the system unless specifically required by federal law for persons defined pursuant to § 36-2901, paragraph 4, subdivision (b).